



Department of Veterans Affairs

Office of Resolution Management

## ALTERNATIVE DISPUTE RESOLUTION PLAN

### **PURPOSE.**

To describe the Alternative Dispute Resolution (ADR) process used by the Office of Resolution Management (ORM) in the settlement of disputes regarding allegations of unlawful discrimination within the Department of Veterans Affairs (VA).

### **BACKGROUND.**

The *Administrative Dispute Resolution Act of 1996*, 5 U.S.C. §§ 571-584, encourages the use of ADR methods to resolve controversies relating to workplace disputes. The use of mediation is endorsed and encouraged by the leadership of the VA, including Labor. The Equal Employment Opportunity Commission (EEOC) has issued its final revision to 29 C.F.R. § 1614. In pertinent part, the new regulations require each federal agency to establish or make available an ADR program for both the pre-complaint and formal complaint process, and for EEO Counselors to offer aggrieved persons who contact them the choice between using ADR processes or traditional EEO counseling processes. For purposes of processing a pending claim of discrimination, 29 C.F.R. § 1614 takes precedence over any conflicting provisions.

VA Directive 5978, Alternative Dispute Resolution (February 23, 2000), established a Department-wide policy supporting the use mediation for resolving workplace disputes and emphasizes VA's commitment to using mediation as early as feasible, to the maximum extent practicable, in an appropriate and cost-effective manner, and at the lowest organizational level. The Directive requires VA Administrations and staff offices to develop plans for ensuring that the option of mediation is available to VA employees to help resolve workplace disputes.

### **POLICY.**

It is the policy of the VA to provide equal opportunity in employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, national

origin, age, disability and sexual orientation; and to not practice retaliation for opposing any unlawful discriminatory employment practice. VA is also committed to using ADR to resolve workplace disputes and issues in controversy in a more timely, less costly and in a less adversarial manner than litigation or administrative adjudication.

ORM was created to provide timely and high quality equal employment opportunity (EEO) complaint processing services to VA employees, former employees and applicants for employment. Traditionally, ORM has offered and continues to offer ORM EEO Counselors to ensure that aggrieved persons seeking counseling understand their rights and responsibilities in the EEO process. EEO Counselors use informal resolution techniques to resolve the dispute at the lowest possible level. They assist aggrieved individuals in articulating claims and facilitate resolution of claims by conducting limited inquiries to obtain appropriate information. For more information on the EEO counseling process please refer to 29 C.F.R. § 1614.105(f), EEOC MD-110 and ORM Standard Operating Procedures (SOP).

In addition to traditional EEO dispute mechanisms, ORM is committed to using ADR techniques, particularly mediation, to find creative, mutually acceptable, and early resolution of disputes as well as to promote principles and practices that will facilitate communication and working relationships. Using mediation to resolve differences demonstrates a commitment to a positive approach and joint ownership of concerns and solutions. The mediation process allows parties to resolve their differences quickly, less formally, in a less adversarial manner, and with more efficient use of resources than traditional EEO mechanisms. Mediation is a problem solving process, voluntary, confidential, mutually agreed upon, and unbiased. To facilitate this policy, to actively support and encourage the use of mediation within VA, and to provide guidance in this area, ORM is establishing the ORM Mediation Program. The aggrieved individual retains the right to decide which process they wish to use, traditional EEO counseling or mediation. Both these processes should be used as early as feasible in the dispute.

### ***SCOPE.***

The ORM Mediation Program will be available to all VA employees who contact or use ORM to address a workplace problem. Mediation is voluntary; aggrieved individuals, management and appropriate union representatives must be willing to use it. In the event an aggrieved individual/complainant agrees to participate in mediation under the ORM Mediation Program, the pre-complaint processing period shall extend up to 90 days. 29 C.F.R. § 1614.105(f). This Program can be used to help resolve disputes, including but not limited to those involving discrimination, reprisal, and other workplace issues. Electing mediation under this or any other mediation program does not suspend statutory deadlines.

### ***DEFINITIONS, ROLES AND RESPONSIBILITIES.***

The Definitions, Roles and Responsibilities set forth below apply only to discrimination matters processed through the ORM Mediation Program. For matters processed using traditional EEO counseling processes refer to 29 C. F R. §1614, EEOC MD-110, and ORM Standard Operating Procedures.

**Mediation** is a type of ADR process in which a specially trained neutral third party, called a mediator, helps the disputants to find a mutually acceptable solution to their dispute. It is a voluntary, confidential, informal, private, non-adjudicative and non-adversarial process. During mediation the parties, with the assistance of a mediator, exchange information, listen to each other's positions, and jointly consider various options to find solutions to their problem(s) that are mutually acceptable to both of them.

**Aggrieved Individual/Complainant** is the individual who alleges that an action was taken against him or her because of unlawful discrimination or reprisal. The aggrieved individual/complainant may bring additional participants to the mediation to provide assistance and advice during the mediation. See also the topic Attorneys, Advocates or Representatives addressed below.

**Management Representative** is the individual from management who has the authority to bind and represent management at the mediation session. Mediation is voluntary, and the management representative may bring additional management participants to the mediation to provide assistance and advice. See also the topic Attorneys, Advocates or Representatives addressed below. The official alleged to have unlawfully discriminated against the aggrieved individual/complainant, referred to as the Responsible Management Official (RMO), may or may not be the management representative.

**Union Representatives** have the right to participate in all stages of the mediation process and are responsible for encouraging the appropriate use of mediation among employees. The union has the right to be present and participate as a party in any mediation session involving a bargaining unit employee. If requested, a union representative may also participate as a party representative.

**Attorneys, Advocates and Other Representatives** from either or both parties may be present and participate in the mediation, although they are not required. Unlike litigation, except for unusual circumstances, these individuals typically take a "back seat" in the mediation session. Participating attorneys, advocates and other representatives are responsible for understanding the mediation process.

**Mediators** are specially trained, neutral individuals whose responsibilities include, but are not limited to assisting the parties to identify issues, fostering joint problem solving, and exploring settlement opportunities. The mediator shall not provide counseling, therapy or legal advice to either party during the mediation process. If, however, the

mediator believes that either party does not understand how an agreement may adversely affect legal rights or obligations, then the mediator should bring this issue to the attention of all parties involved. Mediators should be mutually agreeable to the parties, and should possess the following qualities: a reputation for confidentiality, fairness, patience, honesty, trustworthiness, credibility, and respect. Mediators must be active listeners, good communicators, open minded, creative, empathetic, unbiased, non-judgmental, professional in demeanor, problem solvers, and have the ability to remain neutral. Mediators are not authorized to make decisions for the parties and do not have the power to force a decision on either party; it is the parties who decide whether or not to settle a matter. Mediators are generally VA employees who have volunteered to serve as mediators, and who have received special training in mediator skills, conflict resolution techniques, and other ways to help disputing parties resolve their problems. Mediators will not discuss private conversations with the other party or with other persons who are not participating in the mediation. Mediation sessions are confidential and the parties agree that, if the matter is not settled, the mediator can not be used by either party as a witness in future litigation. Mediators are neutral individuals, have no relationship to either party, and have no personal interest in the outcome of the dispute that they are mediating. Mediators who suspect a possible conflict of interest will make full disclosure to the parties. Each party in a mediation should be willing to use the mediator. See also Mediator Qualifications and Mediator Ethics sections of this Program.

**Co-Mediators** are mediators who work together to mediate a particular dispute. Co-mediation is the preferred process in many mediation programs. The co-mediation model uses more experienced mediators to train or mentor less experienced mediators. Many programs use the co-mediation model to give their mediators more opportunity to mediate or provide more comprehensive coverage during the mediation session. The ORM Mediation Program favors the use of co-mediators to the maximum extent possible.

**Parties** to a mediation session include the aggrieved individual/complainant, the management representative and, in some instances, the union representative. Other individuals may participate in the mediation if the parties agree. All individuals participating in mediation are responsible for entering into and participating in mediation in good faith.

**Deputy Assistant Secretary, ORM**, is the program official responsible for partnering with other mediation training efforts throughout the VA and providing appropriate awareness training to ORM staff. The Deputy Assistant Secretary, ORM affirmatively urges VA managers and supervisors to use the ORM Mediation Program.

**Director, Office of Field Operations, ORM**, is the program official responsible for the oversight of the ORM Mediation Program.

**ORM Mediation Program Coordinator** reports to the Director, Office of Field Operations. Because a mediation program requires input and collaboration across VA organizational lines within VA, the ORM Mediation Program Coordinator must be capable of maintaining excellent working relationships with both labor and management. The ORM Mediation Program Coordinator serves as a resource for information, assists in locating mediators, appropriately maintains information describing the ORM Mediation Program, and tracks the ORM Mediation Program using the user satisfaction survey and other tools. The ORM Mediation Program Coordinator also serves as the chair of the ORM ADR Intra-Agency Work Group and represents ORM as a member of various other ADR committees.

**ORM ADR Liaisons** are located in each of the 12 ORM Field Offices and are designated by the ORM Field Office Managers. ADR Liaisons are responsible for developing a Field Office's plan for obtaining mediators and for coordinating ADR activities at the Field Office. Depending on the policy of the local ORM Field Office, the ADR roles and responsibilities of the ORM ADR Liaison and the ORM EEO Counselors may differ or overlap. The ORM ADR Liaison is responsible for ensuring that respective ADR roles and responsibilities among individuals at the Field Office are determined and clearly understood.

**ORM EEO Counselors** are located in each of the 12 ORM Field Offices and will be responsible for offering and explaining mediation and the ORM Mediation Program to aggrieved parties/complainants. Their other responsibilities are to counsel, inform, interview, research, and inquire in an attempt to resolve allegations that are within the purview of the discrimination complaints process. ORM EEO Counselors are also responsible for identifying matters that are within the scope of the ORM Mediation Program. ORM EEO Counselors and/or ORM ADR Liaisons are primarily responsible for ensuring the adequate and timely processing of individual ADR matters at that ORM Field Office. Their responsibilities include contacting unions and management representatives regarding mediation requests, and interfacing with Local Facility EEO and Affirmative Employment Program Specialists, as well as Local Facility ADR/Mediation Program Administrators, to locate mediators who are mutually satisfactory to the parties.

**The ORM ADR Intra-Agency Work Group** consists of representatives from ORM, the Administrations, affected staff offices and labor; it is responsible for advising, supporting, assisting and encouraging the ORM Mediation Program.

**Local Facility ADR/Mediation Program** is the ADR/Mediation program that has been designed and implemented at the local facility or within a group of facilities. VA and ORM recognize that mediation programs can and do exist at various levels within the Department. Creativity and flexibility are encouraged in the design of a program that adheres to core mediation principles and best practices. VA organizations and facilities should design and implement mediation programs that meet their individual cultures,

needs and resources. The mediators selected at local facilities should be mutually acceptable to both labor and management.

**Local Facility ADR/Mediation Program Administrator** (also sometimes referred to as *Coordinator or Manager*) is the individual at the local facility who has been designated to administer the local facility's ADR/mediation program. The Local Facility ADR/mediation program defines the scope of the individual's duties and responsibilities.

**Local Facility EEO and Affirmative Employment Program Specialists** are the individuals appointed at local facilities to administer their respective EEO and Affirmative Employment Programs. In addition, they are responsible for assisting in the development, coordination, and implementation of the local ADR program in accordance with the local partnership agreement. Their responsibilities may include, but are not limited to, interfacing with the local ORM Field Office, mediating, assisting in settlement negotiations, providing technical advice, as well as initiating other creative solutions for resolving disputes.

**VA Managers and Employees** should support the ORM Mediation Program by using the Program themselves.

**Agreement to Mediate** is a document that is signed prior to the start of the actual mediation session, by all individuals who will be present and/or will participate in the mediation. Signing the agreement to mediate acknowledges the parties' agreement to honor the principles of mediation and to conduct themselves in a manner that supports the mediation process.

**Settlement Agreement** is the document that memorializes the agreement of the parties if they are able to reach settlement as a result of the mediation session. No party is bound by anything said or done at the mediation unless all necessary parties execute a written settlement agreement. The signed settlement agreement shall be legally binding to all parties to the agreement. Settlement agreements shall be executed by individuals having the appropriate authority to bind the parties and must comply with any governing collective bargaining agreement, statute, regulation, and VA policy.

#### **PRE-COMPLAINT STAGE PROCEDURES AND APPLICABLE TIME FRAMES.**

1. When an aggrieved individual contacts an ORM EEO Counselor, 29 C.F.R. § 1614.105(b)(5) requires that the Counselor advise the aggrieved person that s/he may have concerns addressed using the traditional EEO counseling procedures provided for in the regulation, or through the ORM Mediation Program. Before the aggrieved person makes a choice between counseling and mediation, the Counselor must fully inform the person about the ORM Mediation Program, and the differences between the traditional EEO counseling process and mediation. The ORM EEO Counselor should explain that



the aggrieved individual has to choose whether to seek pre-complaint resolution through traditional EEO counseling or through the mediation process.

2. Aggrieved individuals who have discrimination disputes also may go directly to a local facility mediation program to obtain mediator services, without first contacting an ORM EEO Counselor. However, in order to preserve his or her statutory rights to file an EEO complaint, an aggrieved individual must contact an ORM EEO Counselor within the forty-five (45) day statutory time limit. Contacting a Mediation Program Administrator or EEO and Affirmative Employment Program Specialist at the facility **does not** meet the forty-five (45) day statutory requirement.

3. The ORM EEO Counselor shall:

- Discuss with the aggrieved individual/complainant possible ways of resolving the claim.
- Explain mediation and the ORM Mediation Program.
- Offer the aggrieved individual/complainant the option of mediation.
- Explain the respective applicable rights and obligations of the parties.
- Explain that electing mediation does not suspend statutory requirements, and that it is the aggrieved individuals who will ultimately be responsible for ensuring that they preserve their rights by making timely filings.
- Explain that if the mediation does not result in settlement of the matter, the parties do not lose their rights to continue processing the complaint under the EEO process, if they have taken steps to preserve their statutory rights.
- Discuss the parties' right to representation and counsel during the mediation process.
- Explain to bargaining unit employees that a union representative has the right to be present and participate in all stages of the mediation process involving a bargaining unit employee and that employees must be willing to allow the union to be notified in order to use the ORM Mediation Program. Further explain that depending on the circumstances, union officials may participate in a mediation in a variety of capacities: party, party representative/advocate, or behind the scenes.
- Complete appropriate portions of the intake form and gather appropriate documents relating to the matter being mediated.

4. If the aggrieved individual elects mediation, the pre-complaint processing period shall be extended up to 90 days. If the matter has not been resolved before the 90<sup>th</sup> day, the notice of right to file a formal complaint shall be issued. See 29 C.F.R. § 1614.105(f). Depending on the ORM Field Office policy, the ORM EEO Counselor or the ORM ADR Liaison is responsible for executing applicable forms. The mediation will normally be conducted and completed during this 90-day period.

5. If the aggrieved individual elects mediation, the EEO Counselor will contact the Local Facility ADR/Mediation Program Administrator, or if a local facility is not involved, the

ORM ADR Liaison, about the mediation request. It is the Local Facility ADR/Mediation Program Administrator's responsibility to ascertain management's willingness to participate in mediation, continue the scheduling process, make arrangements to obtain the services of a mediator, and successfully complete the mediation process. If a local facility is not involved, the ORM ADR Liaison will perform the mediation scheduling process typically conducted by the Local Facility ADR/Mediation Program Administrator.

6. In the event the aggrieved individual is a member of a bargaining unit, the Local Facility ADR/Mediation Program Administrator shall be responsible for notifying the appropriate union official of the request for mediation. If a local facility program is not involved, the ORM ADR Liaison shall provide this notification. This notification should occur prior to contacting management about the request for mediation. Union notification can be direct, or through the appropriate local points of contact (such as the Local Facility Mediation Program Administrators, EEO and Affirmative Employment Program Specialists, etc.). The Local Facility ADR/Mediation Program Administrator or the ORM ADR Liaison shall also:

- Obtain a response from an appropriate union representative regarding the union's position on the request for mediation. Union response is required in order to act on a request for mediation from a bargaining unit member.
- Keep the union representative periodically informed about the ongoing mediation process.

7. Where the aggrieved individual and union are willing to go forward with the mediation process, the Local Facility ADR/Mediation Program Administrator or the ORM ADR Liaison should next contact the individual appointed by management for coordinating EEO matters, and must:

- Notify the appropriate management official that mediation has been requested.
- Explain mediation and the ORM Mediation Program.
- Explain the respective applicable rights and obligations of the parties (Notice of Rights and Responsibilities)
- Explain that electing mediation does not suspend statutory requirements, and that it is the aggrieved individuals who will ultimately be responsible for ensuring that they preserve their rights by making timely filings.
- Explain that if the mediation does not result in settlement of the matter, the parties do not lose any rights they have to continue processing the complaint under the EEO process, provided they have taken steps to preserve their statutory rights.
- Discuss the parties' right to representation and counsel during the mediation process.
- Explain the rights of the union in the mediation process.
- Provide sufficient factual information from the Intake Information Form/Mediation Referral Form to enable the appropriate management official to decide on the appropriateness of the mediation request.



- Require the appropriate management official to indicate whether s/he is or is not willing to participate in mediating the matter.
- Complete appropriate portions of the intake form including that portion memorializing the election or refusal of mediation.

8. In addition to ascertaining management's, and as appropriate, the union's willingness to participate in mediation, the Local Facility ADR/Mediation Program Administrator or ORM ADR Liaison shall determine the best source to obtain mediators. Generally, any costs associated with providing mediator services, i.e., travel, per diem, etc., will be the responsibility of the facility using the services.

- As a general rule, whenever appropriate and available, ORM EEO Counselors or ORM ADR Liaisons will encourage the parties to use mediators from the parties' Local Facility ADR/Mediation Program. If the parties are unwilling to work through the Local Facility ADR/Mediation Program, other options for obtaining a mediator agreeable to both parties will be considered.
- Other potential sources for obtaining mediator services are set forth below. However, many of these sources will need further development. Individual ORM EEO Counselors or ORM ADR Liaisons may consider any, or a combination of, these options. However, they will attempt to use the most cost-effective method of obtaining mediator services.
  - **Other VA facility level mediation programs.** If the ORM EEO Counselor or ORM ADR Liaison is aware of some other VA facility level mediation program within the area served by the ORM Field Office (within or outside the aggrieved individual's Administration), s/he may attempt to get a mediator from that program. This may be less costly in terms of travel and time than other options.
  - **Other federal agency mediation programs and interagency sharing programs.** In some cases there will be another federal agency mediation program or an interagency mediation-sharing program in the geographical area of the local facility. If the ORM EEO Counselor or ORM ADR Liaison is aware of such a program s/he may attempt to get a mediator from one of those programs. The costs vary depending on the program. Generally, under this arrangement the using facility will be responsible for resolving compensation issues regarding travel, per diem, etc., with the other federal agency or sharing program. ORM may also consider obtaining mediators from other federal agencies and sharing programs both in and outside the geographical area of the VA facility. This option may be costly in terms of travel and other fees.
  - **Department-wide or Administration-wide pools of mediators.** As long range initiatives, the Department and Administrations may elect to support the creation of a Department-wide or Administration-wide pool of collateral duty mediators that could be available to ORM and throughout VA. Under these options the ORM EEO Counselor or ORM ADR Liaison would likely contact Administration-level ADR Coordinators for the local

facility and attempt to obtain a mediator through them. These options need to be developed and are expected to take considerable time to implement, but offer benefits in terms of qualifications and possible certification of VA mediators. However, these are not realistic solutions for ORM's immediate need for mediators.

- **ORM employee mediators.** ORM is training and developing a cadre of skilled mediators within its own ranks. However, to avoid potential conflicts of interest, the ORM employee mediators would not be assigned to mediate cases in which they served as an EEO Counselor. This source of mediators could be costly in terms of travel and ORM employee mediator's time (ultimately taken away from complaint processing).

9. The responsibility for scheduling and conducting the mediation session will rest with the entity providing the mediator services (i.e., the Local Facility ADR/Mediation Program, ORM Mediation Program, etc.). Whenever possible, mediations should be completed within 15 working days of being referred to the mediation program responsible for providing a mediator(s).

10. In matters where an ORM EEO Counselor has been contacted by the aggrieved individual, and ORM's time frames are triggered, the ORM EEO Counselor or ORM ADR Liaison retains primary responsibility for interfacing with the parties and the entity providing mediator services, for monitoring the mediation process, and ensuring that it completed in a timely fashion.

11. The ORM EEO Counselor or ORM ADR Liaison retains primary responsibility for completing and processing all forms and documents that apply to the ORM Mediation Program.

12. Each phase of the mediation process, from the initial mediation request through the signing of applicable agreements, should be conducted as expeditiously as feasible. The use of appropriate means of electronic transmittal with receipt confirmation is encouraged.

13. If a settlement is reached, the mediator will transmit the signed settlement agreement to the ORM EEO Counselor and other appropriate personnel.

14. If a settlement is not reached, the aggrieved individual does not lose his/her rights to continue processing the complaint under the EEO process. The EEO process resumes at the point it was suspended. However, EEO counseling will terminate and the EEO Counselor will issue a Notice of Right to File a Discrimination Complaint to the aggrieved individual.

### ***FORMAL COMPLAINT STAGE.***

Requests for mediation are welcome at any point during the complaint process. In the formal stage, the time period for complaint processing may be extended by agreement for not more than 90 days. A designated individual at each ORM Field Office will respond to requests for mediation during the formal stage.

### ***MANAGEMENT'S REQUEST FOR MEDIATION.***

Management officials who wish to try mediation to resolve a conflict are encouraged to contact the ORM ADR Liaison in the appropriate Field Office.

### ***MEDIATOR QUALIFICATIONS.***

ORM employee mediators providing mediator services under the ORM Mediation Program must meet the following minimum requirements:

- The mediator has successfully completed an ORM mediation skills training or a 32 hour mediation skills course;
- The mediator has co-mediated at least three cases with a qualified neutral and received positive evaluations from a qualified trainer/evaluator and/or the parties; and
- The mediator must be in good standing in the primary programs under which (s)he provides mediator services.
- The mediator must be familiar with appropriate EEO law and policy.

All other mediators providing mediator services under the ORM Mediation Program are encouraged to meet the following minimum requirements:

- The mediator has successfully completed a 24 hour mediation skills course;
- The mediator has co-mediated at least three cases with a qualified neutral or has mediated five cases independently and received positive evaluations from a qualified trainer/evaluator and/or participants; and
- The mediator must be in good standing in the primary programs under which (s)he provides mediator services.

Co-mediators participating in the ORM Mediation Program are encouraged to have completed the minimum training requirements listed above and to have been mentored by experienced mediators.

### ***MEDIATOR ETHICS.***

The mediator follows professional guidelines for the practice of mediation. In addition, to having personal principles and values that assist the mediator to act with integrity, mediators under the ORM Mediation Program are expected to:

- Maintain the confidential setting of the mediation process.
- Not coerce parties into a settlement; the decision to settle should remain with the parties in consultation with their counsel.
- Give no legal advice or counsel to either party.
- Be impartial and not let bias for or against either side affect the conduct of the mediation.
- Disclose acquaintances and material past relationships to the parties before mediation commences and as soon as the relevance of the acquaintanceship or relationship is known.
- Facilitate parties' communications to the extent they will allow, but do no harm to any party or a party's litigation position.
- Not act as judges or as arbitrators of the fairness of a particular settlement, provided the settlement satisfies both parties and each party is represented by counsel. Where one or both parties are not represented by counsel, and a mediator suspects a possible illegality in the settlement, the mediator should discuss with the parties the desirability of the parties obtaining legal review of the settlement.

### ***PROGRAM EVALUATION.***

At the conclusion of the mediation, all participants, including mediators, will complete short evaluation forms that will be forwarded to the ORM EEO Counselor or the ORM ADR Liaison. Local Facility ADR/Mediation Coordinators will also be asked to complete short evaluation forms. The forms are designed to provide statistical data and to help the ORM ADR Coordinator assess strengths and weaknesses of the process and to provide quality control. As needed, the ORM ADR Coordinator will provide appropriate feedback to participants, Local Facility ADR/Mediation programs and neutrals. The ORM ADR Coordinator will produce an annual report evaluating the ORM Mediation Program.